United States Court of Appeals

for the Second Circuit

PETITIONER'S REPLY BRIEF

No. 76-4227

United States Court of Appeals

FOR THE SECOND CIRCUIT

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, and LOCAL UNIONS NOS. 1212, 4, 45, 202, 1200, 1220 and 1228, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, *Petitioners,*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent,*

and

CBS, INC., *Intervenor.*

On Petition to Review an Order of the National Labor Relations Board

REPLY BRIEF OF PETITIONERS INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, et al.

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C A S E S

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I.

A. CBS attempts to portray this Court's role as a limited one in reviewing the Board's Decision (Br., pp. 25-28). It cites Section 10(e) of the Act and cases which deal primarily with judicial review of factual findings of the Board. As is demonstrated by a review of all the briefs, however, there is virtually no dispute, if any, as to the facts of the case. Rather, the issues

presented are essentially those of law. And it is well established that the role of a court in reviewing questions of law is considerably broader than when it is reviewing disputed issues of fact. Perhaps the leading statement of the role of a court in reviewing the legal conclusions of an administrative agency is found in the Supreme Court's decision in NLRB v. Brown, 380 U.S. 278 (1965). There, as here, it was argued "that the Board's decision is within the area of its expert judgment and that, in setting it aside, the Court of Appeals exceeded the authorized scope of judicial review." 380 U.S. at 290. The Supreme Court rejected that argument in the following terms:

> "Reviewing courts are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute. Such review is always properly within the judicial province, and courts would abdicate their responsibility if they did not fully review such administrative decisions. Of course due deference is to be rendered to agency determinations of fact, so long as there is substantial evidence to be found in the record as a whole. But where, as here, the review is not of a question of fact, but of a judgment as to the proper balance to be struck between conflicting interests, '[t]he deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress.' American Ship Building Co. v. Labor Board, 380 US at 318." 380 U.S. at 291-292.

B. Throughout its brief, presumably as part of its effort to narrow the scope of this Court's review of the case, CBS repeatedly refers to undisputed or agreed-upon facts as Board findings. For the reasons stated above, however, the issues presented by the

instant petition are those of law and not of fact, and this device cannot succeed in transforming this case into one turning on the "substantial evidence" test.

Moreover, certain of the "findings" cited both by CBS and the Board are questionable at best. For example, CBS states (Br., p. 14) that "the Board found that the presence of Mr. Nolan constituted a serious impediment to the bargaining process, due to the temptation available to Mr. Nolan subsequently to disclose that confidential information" (citing, inter alia, a portion of the Administrative Law Judge's (hereinafter, "ALJ") decision at A. 268 and the Board's adoption of his decision at A. 271). CBS neglects to mention that, at footnote 1 of its Decision (A. 271), the Board expressly refused to adopt "the Administrative Law Judge's comments with respect to NABET's duty to disclose information it might receive on a confidential basis as a result of its participation in such bargaining." The Board thus disavowed the ALJ's discussion (at A. 268) of NABET's duty to disclose information, to which CBS refers. The Board's disavowal applies as well to the ALJ's finding (at A. 269), also cited by CBS (Br., p. 15), concerning the lack of protection in the Union's offer of a pledge of confidentiality. The ALJ's concurrence with CBS' position in this regard is clearly tied to his view (later rejected by the Board) of the duty of NABET to disclose to its constituents information received as part of the IBEW bargaining committee.[1/]

1/ This same observation applies equally to the Board's reference (Br., p. 23) to the same portion of the ALJ's decision (A. 269). It also applies to the quotation from the ALJ's decision by CBS at p. 30 of its brief.

Close scrutiny of the arguments offered by the Board and CBS for upholding the Board's Decision reveals that they suffer from the same defect. Their briefs assert the existence of a "clear and present danger to the bargaining process," resulting from a combination of (a) the need of CBS to disclose confidential information in the course of bargaining with the IBEW, (b) the desire of CBS to preserve its competitive advantage in electronic news coverage over the rival networks, and (c) the alleged danger to CBS which would result from the presence of NABET -- which represents only employees of the other networks -- at the bargaining table when confidential information was revealed. For the reasons just shown, however, that line of reasoning rests upon the same fallacious notion of NABET's duty to "disclose information it might receive on a confidential basis as a result of its participation in such bargaining" (A. 271, n. 1), which the Board expressly rejected.[2/]

II.

Although they do not go to the legal issues which are at the heart of this case, several comments are in order with respect to the responses of CBS and the Board to certain statements made in our opening brief. The first statement (Op. Br., p. 11, citing pp. 112-113 of the Appendix) is that CBS negotiator Sirmons "didn't care what the IBEW did as far as passing on any information imparted at bargaining sessions to Lynch, as long as that was done outside

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2/ Indeed, the Board's Decision itself contains a basic inconsistency in this regard. Thus, although the Board affirmed the "rulings, findings,and conclusions" (A. 271) of the ALJ, it rejected his principal premise (A. 268-69) which really served as the underpinning for his conclusions (A. 271, at n. 1).

the actual negotiating sessions." CBS claims (footnote at p. 16 of Br.) that this statement is "rather misleading", since it refers to testimony given by Union negotiator Draghi, and not to the testimony of Sirmons or a finding by the Board. We think that the short answer to this unwarranted characterization is that the statement in our opening brief in no way suggested that it was either a finding of the Board or the testimony of Sirmons, and the Appendix pages we cited are to the testimony of Draghi. 3/

CBS is also quick to label as "rather misleading" (footnote at p. 17 of Br.), and for the same reason, our quotation of Draghi's testimony that Sirmons stated that, "there wasn't one god-damn thing he was going to discuss in front of NABET," which appears at pp. 12 and 32 of our opening brief. Since, as CBS notes, the Appendix reference cited in our brief (to A. 117) was to Draghi's testimony, and since there is no suggestion in either place in our brief that this quotation either was from Sirmons' testimony or was a Board finding, we suggest that CBS' pejorative term is once again unwarranted.

Finally, one point made by the Board (Br., p. 27, n. 19) is well taken, insofar as it notes that a quotation of Sirmons' testimony (Op. Br., p. 13) contains an incorrect word. Referring to

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3/ Although CBS also claims (Ibid) that we have "badly bowdlerize[d]" this testimony of Draghi, our point -- that the basic distinction drawn by CBS in this regard was between information disclosed to Lynch inside vs. outside of negotiating sessions -- is in fact confirmed by the substance of the first footnote at page 36 of CBS' brief. We submit that this confirmation of our point by CBS also serves to answer a similar claim made by the Board (Br., p. 15, at n. 13).

the basis of CBS' refusal to disclose confidential information to NABET, Sirmons stated that CBS did not "face that question in that way" (A. 212). Our brief inadvertently quoted him as saying that CBS did not "face that question in any way", and we regret that error. The Board incorrectly suggests, however, that this was an attempt to discredit Sirmons' testimony. Our opening brief contains no claim, and we make none here, that Sirmons was not a credible witness. Indeed, at the outset of our factual statement (Op. Br., p. 3), we noted that there is substantial agreement on the facts of the case and that there is "little if any difference" between the accounts of the only two witnesses in the hearing (Sirmons and Draghi).[4/]

III.

We see no need for an extended discussion of the cases cited by the Board (Br., pp. 18-20) and CBS (Br., pp. 22-24) which have been found to constitute exceptions to the broad rule of General Electric Company v. NLRB, 412 F.2d 512 (2nd Cir. 1969), and related cases.[5/] We respectfully refer the Court's attention to the discussion of those cases at pp. 20-25 of our opening brief. We reiterate only that, unlike the cited cases, there is no record evidence here which demonstrates any avowed hostility or other

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4/ Our position in our opening brief (pp. 31-33) was that, based on the mutually consistent testimony of both witnesses, there was reason to doubt that CBS' refusal to bargain was based solely on its fear of disclosure of confidential information.

5/ CBS also attacks (Br., pp. 37-41) both the result and rationale of General Electric itself. In response, we merely suggest that CBS' argument is fully answered by this Court's opinion in General Electric. See also the discussion of the pertinent portions of that opinion at pp. 18-21 of our opening brief.

circumstances which would doom bargaining from the outset.[6/] And, although the Board and CBS tend to ignore or gloss over the reasons for the efforts of the unions in the broadcast industry to engage in coordinated bargaining, there is specific evidence in the record demonstrating those reasons. (See pp. 21-22 of our opening brief.)

CONCLUSION

For the reasons set forth above, and those in our opening brief, the Decision and Order of the Board should be set aside and the case remanded to the Board with directions to find that CBS violated Sections 8(a)(1) and (5) of the Act, as alleged in the Complaint.

Respectfully submitted,

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6/ Although both briefs refer to the "temptation" noted by the Board in its decision in Bausch & Lomb Optical Company, 108 NLRB 1555, 1562 (1954), it should be recalled that, in its later General Electric decision (173 NLRB 253, 254-255 (1968)), the Board stated that its decision in Bausch & Lomb "rested explicitly on the fact that the union stood in a position of a business competitor, which, unlike the employees it represented, stood to benefit if the employer could be forced out of business after being compelled to yield to inordinate demands."